In the Supreme Court of the United States

October Term, 1914

E. B. Johnson et al.,
Plaintiffs in Error,
vs.
F. E. Riddle,
Defendant in Error.

No. [redacted]161

Reply Brief for the Defendant in Error in Support of His Motion to Dismiss the Writ of Error, and also Brief for Defendant in Error on the Merits of the Case.

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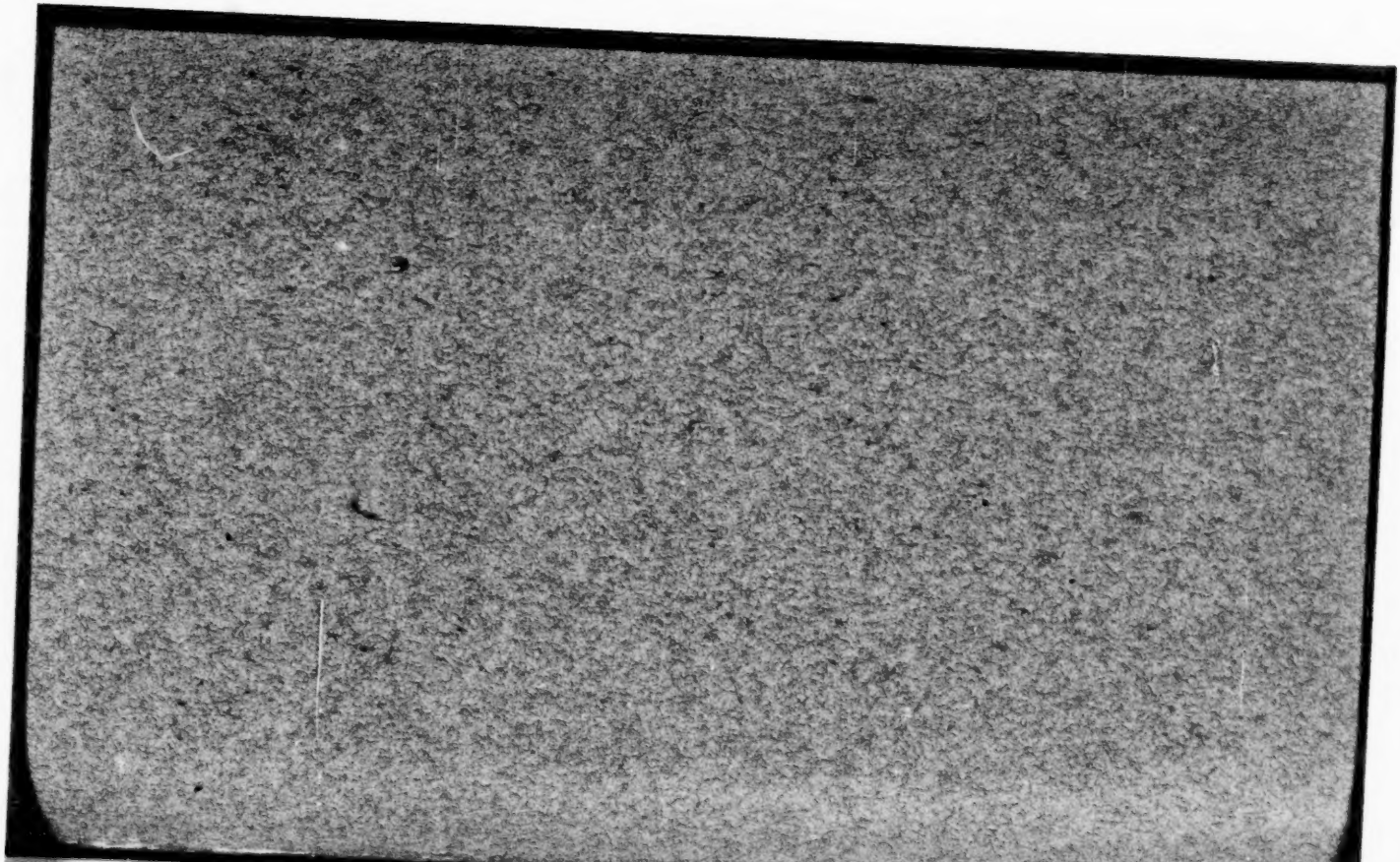

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No. 498

Reply Brief for the Defendant in Error in Support of His Motion to Dismiss the Writ of Error, and also Brief for Defendant in Error on the Merits of the Case.

The brief filed on behalf of plaintiffs in error evinces the hope that the Court may overlook the question of jurisdiction, and determine the case on its merits. We submit that the better practice

would be to inquire into the jurisdiction first, and if the Court finds it has no jurisdiction the writ of error should be dismissed.

We have examined the cases cited by counsel for plaintiffs in error in the latter part of their brief, in which they undertake to reply to our motion to dismiss, and confidently assert that the controlling proposition in our motion to dismiss is not disturbed by the cases cited by them.

It is apparent from the decision of the Supreme Court of the State of Oklahoma that both parties contended that the owner of the improvements on the lot in controversy had the preference right to purchase it under the provisions of the treaty, and the court sustained that contention. It is held in accordance with the plain language of the treaty, that the owner of the improvements on the lot had the right to purchase it. The defendant in error, being the plaintiff in the court below, asserted title under the patent, and based his right to the patent on the fact that he was the owner of the improvements on the lot. His title was disputed. It was incumbent on him to recover on the strength of his own title. In order to determine whether or not defendant in error, plaintiff in the court below, had title to the lot,

the Supreme Court of the state examined the treaty, and held that the plaintiff was the owner of the lot because of his patent, and his ownership of the improvements on the lot. To that extent, and to that extent only, the Supreme Court construed the treaty, and it sustained the contention of both plaintiff and defendants in the court below in their construction of the treaty; that is, that the owner of the improvements had the preference right to purchase the lot.

In passing on the contention in the cross complaint of plaintiffs in error in the court below, in which they claimed that they were entitled to purchase the lot because they were the owners of the improvements, a preliminary and controlling question arose, which was decided against them. It cannot be said that any title, right, privilege, or immunity claimed by plaintiffs in error under any treaty or statute of the United States was denied on the ground that the decision of the court is against the title, or right, so claimed, because the record discloses the fact that plaintiffs in error were not in position to assert any such right or title under the statute or treaty. So far as the construction of the statute is concerned, their contention was sustained, but the state

courts and the department of the interior held against the plaintiffs in error on the ground that they were never the owners of the improvements on the lot, and therefore had no right to purchase the lot. They were defeated by the decision of the interior department, the trial court and the Supreme Court, on the preliminary question as to the ownership of the improvements on the lot. It cannot be said that the treaty or statute conferred the ownership of the improvements on them, nor can it be said that the treaty or statute conferred on them the right to the possession of the lot, or the right to improve the lot. The only contention that they could make under the treaty or statute is that being the owner of the improvements on the lot they had the preference right to purchase it, but before that question could arise the preliminary question had to be disposed of, and the decision on this preliminary question before the interior department, the trial court and the Supreme Court was against plaintiffs in error.

The decision on this question depended upon the local law and upon a question of fact. Manifestly, under the well established rule in this Court, no Federal question can be predicated upon

the decision of the Supreme Court on this preliminary question of local law and fact. The case of the plaintiffs in error was disposed of before it reached a Federal question.

Counsel for plaintiffs in error are hardly fair in their quotation from the syllabus in the case of *Miedreich* v. *Lauenstein*, 232 U. S., page 236, where this Court said that a Federal question which the highest state court regards as duly before it for consideration, and which it proceeds to determine, will be regarded by the Federal Supreme Court on writ of error to the state court as duly made, because in that case the Court held that under the allegations of the complaint a Federal question was distinctly raised, and determined against the contention of the party who procured the writ of error. We find no difficulty with that case whatever. The decision of the State Supreme Court which was reviewed in that case showed conclusively that it considered and determined against the plaintiff in error his contention that the rights asserted by him were protected by the Fourteenth Amendment to the Constitution. This Court, therefore, properly held that the case involved a Federal question within its jurisdiction.

But we invite attention to the fact that the Supreme Court in that case refused to review a preliminary question to which the plaintiff in error called the attention of the Court, and held that it would not revise the findings of the highest state court upon the issue of whether service of process was fraudulently procured where evidence in support of the state court's decision on this point is conflicting.

Nor is the case of the *American Express Company* v. *Maynard,* 177 U. S. 402, an authority against our contention, because that case involved directly the construction of the Act of Congress known as the War Revenue Act, and the right asserted by the Express Company under that act was denied.

Nor is there anything in the case of *Wadkins* v. *Producers Oil Company,* 227 U. S. 368, which militates against our contention. In that case, as in the case at bar, both parties claimed the right under the laws of the United States, and the Court properly held that the Supreme Court had jurisdiction of a writ of error to a state court to review a decision in a suit in which both plaintiff and defendant asserted rights under homestead entry, and the Federal question was passed upon

by the state court and made an element in its decision, but in that case the decision of the state court upon the Federal question was against the right asserted by the plaintiff in error. No controlling preliminary question was involved or passed upon. Every element of the case and every fact which was considered by the state court related to the Federal question. The controlling question in the case was whether a homestead entry in the State of Louisiana, made under the laws of the United States, by the father of a minor is community property, her mother having died before the perfection of the entry. The Louisiana Supreme Court held it was not community property, and that the husband took the entire title, thereby denying the right claimed by the minor. The minor procured a writ of error from the Supreme Court of the United States to the State Supreme Court to review this decision. Every fact considered by the Supreme Court bore directly on the right thus asserted under the laws of the United States.

None of the other cases cited by opposing counsel in opposition to the motion to dismiss the writ of error involved a controlling preliminary question.

See also *Gillis* v. *Stinchfield*, 159 U. S. 658, *Carothers* v. *Mayer*, 164 U. S. 325. See also the case of *Wynne, Executor*, v. *Morris*, 20 Howard 5, where this Court says:

> "Where complainant has no interest in land, but a naked possession, not protected by an Act of Congress, this Court has no jurisdiction to review a decision of the state court adverse to such title, no statute of the United States being drawn in question."

We earnestly insist that plaintiffs in error by their act in filing the motion insisting in the Federal trial court that no Federal question was involved and inducing that court to remand the case to the State court on the ground and for the reason that no construction of a Federal statute of a Federal question involved, are now estopped from insisting in this court that such questions are involved.

It was said by Mr. Justice Brown, in the case of *Cowley* v. *Northern Pacific Railway Company*, 159 U. S., page 568, 40 Law Ed. page 263, quoting from page 267:

> "The wise policy of the constitution gives him a choice of tribunals. The case having been removed to the Circuit Court upon petition of defendant it does not lie in its mouth to claim that such court had no jurisdiction

> of the case, unless the court from which it was removed had no jurisdiction."

In the case of *Bushnell* v. *Kennedy*, 76 U. S., page 387, 19 Law Ed. page 736, Mr. Chief Justice Chase said:

> "The first act of the defendant, indeed, under the twelfth section, is something more than consent, something more than waiver of objection to jurisdiction, it is prayer for the privilege of restoring to federal jurisdiction, and he cannot be permitted afterwards to question it."

The same principle will apply in the case at bar, the plaintiffs in error having alleged lack of a Federal question and caused the court to so adjudicate, it does not now lie in their mouth to assert in this court that there is a Federal question.

We therefore submit that the writ of error must be dismissed.

REPLY TO BRIEF ON THE MERITS.

The right to purchase a lot was not conferred upon the landlord in preference to the tenant, neither was it conferred upon the possessory right or the person in rightful possession. The right was specifically conferred upon the person who was the legal owner of permanent, substantial and valuable improvements other than fences, tillage and temporary houses, irrespective of the fact as to the possession of the lot or the relation of landlord and tenants. A person out of possession, if he owned the improvements which would bring him within the terms of the agreement had the right to purchase as against both the landlord and the tenant.

The provision of the treaty, so far as affects this case, is as follows:

> "It is further agreed that there shall be appointed a Commission for each of the two Nations. * * * Each of said Commissions shall lay out townsites, etc. * * * Said Commission shall have prepared correct and proper plats of each town and file one in the clerk's office of the United States Court for the district in which the town is located, and one with the Principal Chief or Governor of the Nation in which the town is located, and one with the Secretary of the Interior, to be approved by him before the same shall take effect. When said towns are so laid out each

lot on which permanent, substantial and valuable improvements, other than fences, tillage and temporary houses have been made, shall be valued by the Commission provided for the Nation in which the town is located, at the price a fee simple title to the same would bring on the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty percentum of the appraised value of said improved property, and the remainder of said improved property at sixty-two and one-half percentum of said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall within ten days from his purchase pay into the Treasury of the United States one-fourth of the purchase price and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the Commission fail to agree as to the market value of any lot or the limit or extent of said town, one of said Commissioners may report such disagreement to the Judge of the District in which said town is located, who shall appoint a third member to act with said Commission, who is not interested in town lots, who shall act with them to determine said value. If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot with the improvements thereon shall be sold at public auction to the highest bidder, under the direction of the aforesaid Commission, and the purchaser at

> such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one-half per cent of said appraised value of the lot, and shall pay the sixty-two and one-half per cent of said appraised value into the United States Treasury, etc. * * * All lots not so appraised shall be sold from time to time at public auction, after proper advertisement, by the Commission for the Nation in which the town is located."

The cases relied on by the plaintiff, such as *Rector* v. *Gibbons*, reported in 111 U. S., page 206, involved provisions of an Act of Congress conferring the right to purchase upon the occupancy or upon the rightful possessor of the lot. Necessarily, in such cases the right would extend to the landlord in preference to the tenant, since the tenant's occupancy or his possession of the lot would be that of the landlord. This is not true, however, under the provision of the Atoka Agreement, *supra*.

It is provided in the treaty that unimproved lots should be appraised and sold at public sale.

It also provides how the owner of the improvements shall pay the appraised value, and provides that if such owner of the improvements fails to pay the appraised value, the lot on which he owns improvements shall be sold in the manner

provided for the sale of unimproved lots. Provision is also made for the condemnation and appraisement of improvements on lots, purchased at public sale, where the owner of the improvements fails to purchase the lots. In the plainest terms possible the treaty recognizes the ownership of the improvements on the lot as the sole test of the right to purchase. The right to purchase the lots is not conferred on the lessor, or the person entitled to the possession of the lot under any contract or lease. It is given solely to the owner of the improvements.

The provision of the treaty, quoted above, was framed and adopted with reference to the known conditions then prevailing in the Chickasaw and Choctaw Nations. It was known that most of the townsites were settled and most of the houses built thereon under lease contracts executed by members of the tribes and white persons. The towns were built as a result of the enterprise, in great measure, of white persons who had settled in the Indian Territory, who were willing to risk the investments made by them in improvements upon town lots, on the faith that the Government and the tribes would, in some way, provide a means for the acquisition of title.

But it was universally known that all such arrangements were restricted to the possessory use of town lots and did not involve title. If the purpose had been to make possession, or the right to possession, the test of the privilege of purchasing lots in townsites, apt language to that effect would have been used. The real pioneers in all the towns were the white people who improved the town lots under these conditions. The Indian lessors secured ample protection in the hundreds of thousands of dollars which these white people paid for the lots. The treaty itself directs the distribution of this money immediately to the members of the Tribes. The Indian lessor incurred no risk; the owner of the improvements incurred all the risk. He was protected only by the provision of the treaty which gave him the preference right to purchase the lot at less than its appraised value.

In this spirit and under this construction of the treaty hundreds of thousands of lots have been disposed of in the Chickasaw and Choctaw Nations.

We are not contending for a narrow or strained construction; ours is the natural, and in fact, the only construction which can be placed

upon the language used. The construction adopted by attorneys for plaintiffs in error necessarily interpolates into the treaty language which the owners of the townsites did not employ. They contend that although Bourland and Cross and E. H. and H. B. Johnson did not own any improvements whatever upon the lot in question at the time it was scheduled and patented, they were entitled to purchase it because their predecessors had leased the lot to the predecessor of defendant in error, Riddle.

The fact that in this case the tenant is not the active agent in the disposition of the title should be considered; that Congress and the Tribes took the initiation and designated the tenant in this case, because he was the owner of the improvements, as the person who should have the right to acquire the title; and he acquired it under the terms of the treaty. His relation to Fitzpatrick and Bourland and Cross as tenant of the possessory claim to the lot, could, in no way, overturn the provision of the treaty and confer the right to purchase on persons to whom this privilege was not given by the treaty.

His possession of the lot was not the basis of his right to purchase; he did not use his pos-

session of the lot as a means of acquiring the title, but depended upon the ownership of the improvements which were erected lawfully long prior to the date of the treaty.

We submit that the right to purchase on the part of Ellis or Riddle does not in any way depend upon a breach of the contract of tenancy. The right to purchase does not arise out of the tenancy under the possessory claim. It is absolutely independent of that relation. It has its foundation in the terms of the treaty, conferring the right to purchase on the owner of the improvements.

Our construction of the provision of the Choctaw and Chickasaw treaty, on the subject of the disposition of town lots, is strengthened by consideration of what is known as the "Curtis Act," and the treaties ratified by Congress with the Cherokee and Creek tribes.

The Curtis Act, approved June 28, 1898, 30 Stat. L. 495, in section 15, provided for the creation of a Townsite Commission for the Chickasaw and Choctaw, Creek and Cherokee tribes, to consist of one member appointed by the chief executive of the tribe, one by the secretary of the interior and one to be selected by each town where

lots were to be disposed of. In that act there was no expressed provision that the owner of improvements on the town lots should have the unconditional right to purchase, but it was provided that after the lots were appraised the owner of the improvements thereon should have the right to deposit the appraised value of the lot in the treasury of the United States at St. Louis, which deposit should be deemed a tender to the tribe of the purchase money for the lot. And when the purchaser made all the payments, it was provided that he could file a petition in the proper United States Court for the condemnation of the lot.

It was provided, however, that if what is known as "The Atoka Agreement" should be ratified on or before the first day of December, 1898, then "The Atoka Agreement," as to the disposition of town lots, etc., should become effective. The Agreement was ratified and became effective, superseding the Curtis Act on the subject under discussion. This "Agreement" contains the unqualified provision that the owner of improvements on each lot shall have the right to purchase the lot at the percentage of the appraised value mentioned therein.

The Cherokee tribe made an agreement with

the "Daws Commission," which was ratified August 7, 1902, superseding the provisions of the 15th section of the Curtis Act in so far as the disposition of town lots was concerned, and made important changes, particularly with reference to the persons entitled to purchase lots. We invite careful consideration of this "Agreement," 32 Stat. L. 616.

The 39th section of the agreement provides that whenever any tract of land should be set aside by the Secretary of the Interior for townsite purposes, as provided in the act of May 31, 1900, or by the terms of the Agreement, which tract of land is occupied at the time of such segregation by any member of the Cherokee Nation, shall be allowed to purchase any lot upon which he has improvements other than fences, tillage and temporary improvements, or if he should so elect, the lot should be sold under rules and regulations prescribed by the Secretary of the Interior, and he should be compensated for his improvements thereon, out of the fund of the tribe arising from the sale of town lots.

Sections 41, 42 and 43 of that Agreement read as follows:

> "Any person being in possession or having the right to the possession of any town lot or

lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the Act of Congress approved May thirty-first, nineteen hundred (31st Stat., page two hundred twenty-one), the occupancy of which lot or lots was originally acquired under any townsite Act of the Cherokee Nation, and owning improvements thereon, other than temporary buildings, fencing, or tillage, shall have the right to purchase the same at one-fourth of the appraised value thereof.

"Any person being in possession of, or having the right to the possession of, any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the Act of Congress approved May thirty-first, nineteen hundred (31st Stats. page two hundred twenty-one), the occupancy of which lot or lots was originally acquired under any townsite Act of the Cherokee Nation, and not having any improvements thereon, shall have the right to purchase the same at one-half of the appraised value thereof.

"Any citizen in *rightful possession* of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase same by paying one-half the appraised value thereof: Provided, That any other person in undisputed possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase such lot by paying the appraised value thereof."

Special attention is called to the fact that by these provisions of the treaty, the right to purchase was given to persons having possession, or having the right to the possession of town lots, where the occupancy of such lot or lots was originally acquired under any townsite Act of the Cherokee Nation, upon paying the percentage of the appraised value mentioned in the treaty. This is a clear recognition of the "prior holding of the lot" as a basis for the right of purchase, and if counsel were construing the Cherokee Treaty, their theory on this point would have been correct. "The prior holding of the lot," in the Cherokee Nation, was made the basis of the right to purchase, because the Cherokee Nation had adopted its own statutes and regulations for the disposition of town lots, and provided for the appointment of a Townsite Commission, etc. See Cherokee Laws 1892, pages 381-382. The Cherokee Nation having disposed of lots in its towns, and collected the purchase money therefrom, felt under obligations to confer the right of purchase under the treaty upon persons having the possession, or right of occupancy, under any townsite law of that Nation, whether the lot was improved or not. If the lot was improved, the

persons in possession, or having the right of occupancy, were permitted to buy the lot at one-fourth of its appraised value. If he had no improvements on the lot, he was required to pay one-half of the appraised value. As stated above, here the "previous holding of the lot" was expressly made as the basis for the title, which was to be consummated in the execution of the patent. But no such condition was provided in the Chickasaw and Choctaw treaty. In the making of both these agreements, the United States was represented by the "Daws Commission," and the language in the two treaties was aptly employed to meet the conditions prevailing in each of the tribes. In the Chickasha and Choctaw Nations there were no statutes and regulations providing for the disposition of town lots prior to the adoption of the treaty, and it was thought wise to give the owner of the improvements on each town lot in these tribes the preference right to purchase, without regard to the "previous holding of the lot." We have not had access to the statutes of the Creek Nation, and do not know whether in that Nation provision had been made for the sale of town lots before the Curtis Bill or the Supplemental Treaty between the United States and the Creek Tribe were adopted, but for some rea-

son, growing out of the local conditions in the Creek Nation, the "Daws Commission" agreed to a provision for the purchase of town lots, similar to those which were adopted for the Cherokee Nation. The "Supplemental Treaty" with the Creek Nation was adopted March 8, 1900, 31st Stat. L. 861. By the 11th provision of that Act or Treaty it was provided that any person in rightful possession of any town lot, having improvements thereon, other than temporary buildings, fences and tillage should have the right to purchase such lots by paying one-half of the appraised value. Under this provision, in order to have the preference right to purchase, the purchaser must have both the rightful possession and own improvements on the lot. By section 12 of that treaty it was provided that any person having the right of occupancy of a residence or business lot, or both, whether improved or not, and owning no other lot or land in the town, should have the right to purchase such lot by paying one-half of the appraised value. By section 13 of the Act, it is provided that any person holding lands within a town, occupied by him as a home, and any person. who had, at the time of the signing of the agreement, purchased any lot, tract or parcel of land therein, or any person in legal possession

at the time should have the right to purchase the lot on paying one-half of the appraised value, not, however, exceeding four (4) acres. Other provisions were made for the purchase of lots on conditions named in the treaty.

The fact that the "Daws Commission," representing the United States, made different provisions with each of these tribes for the disposition of town lots is significant. And the further fact that in both the Creek and the Cherokee Nations the "manner of the previous holding of the lot" was made the basis of the right to purchase, when no such provision was made in the Choctaw and Chickasaw Treaty, is also significant.

No uniform rule for the disposition of town lots was adopted in making these treaties. Each tribe had its own conditions to contend with, and insisted on apt provision being inserted in the treaty to carry its own policy.

We submit that in determining the right to purchase under the Cherokee and Creek Treaties, the "manner of the previous holding of the lot" must be looked to, because the Treaty so provided. But in the case of the Choctaw and Chickasaw Treaty, no such provision is made, the preference right to purchase being conferred solely on the

owner of the improvements on the lot. The provision of the Treaty is so plain that the rules of construction need not be resorted to. There can be no such thing as the intent of a statute not expressed in its words. This rule is aptly expressed in section 388, Vol. 2 of Lewis' Sutherland Statutory Construction, as follows:

> "While the object of all construction and the purpose of all rules of interpretation is to ascertain the legislative intent, and while, in construing a particular part of a statute, the whole act may be regarded and all other acts bearing on the subject, and all extraneous circumstances which the legislature may be supposed to have in mind may be properly taken into consideration, yet the intent which is finally arrived at must be an intent consistent with, and fairly expressed by the words of the statute themselves. A legislative intention not expressed in some appropriate manner has no legal existence."

"The previous holding of the lot" in this case began in 1892, between two non-citizens of the tribe. It would have been competent for Congress and the tribes to make the manner of this "previous holding" the basis for title, but they did not do so. "The previous holding of the lot" referred to by counsel did not concern the title, but related wholly to the possessory claim. Contracts with reference to posses-

sory claims, whether in the form of leases or involving the delivery of possession were valid as between the parties, but void as against Congress and the Tribes.

The difficulty with counsel is that they are arguing an assumed case not justified by the record. They are assuming that the improvements were not rightfully on the lot, which the facts as found show that they were not only lawfully owned but rightfully so under the terms of an agreement, which agreement did not contemplate they should be removed.

The construction of this provision of the Treaty by the Supreme Court of Oklahoma is in harmony with the views of the Circuit Court of Appeals as expressed in the case of *Frier* v. *Washington*, 128 Federal 280, which case is relied on by plaintiff in error. Judge Thayer, in delivering the opinion of that court stated:

> "It is true that the Act concedes to the owner of improvements upon any townsite lot the preference right to purchase the lot after the townsite has been surveyed and platted, and the lots have been appraised, on making certain specified payments within a certain period, but it does not appear in the present instance that any of these things have been done or that the time has arrived when a purchase can be effected."

It is very clear to our minds that the cases relied on by counsel for plaintiffs in error, and the leading case being *Rector* v. *Gibbon, supra,* are inapplicible to the facts in the case before the court.

That case was a bill in equity brought by the plaintiff, Rector, to charge the heirs of David Ballantine as trustees of certain property in the Hot Sprigs Reservation in the State of Arkansas, and compel them to convey it to him. It appears that the plaintiff entered upon the parcels of land in controversy in 1839, and remained in exclusive possession until 1876, when they were taken in charge by the court of claims, under the provisions of an Act of Congress, passed in 1870. The title to the land in controversy was held to be in the United States, but on suggestions of the Supreme Court, an Act of Congress was passed providing for the acquisition of title. In 1873, with the consent of Rector, the land was leased, sub-let to Gibbon and Kirkpatrick for the purpose of constructing a hotel, bath house and out-houses thereon, in consideration of an annual rent.

The court correctly held that Rector was the person for whose benefit this section of the stat-

ute was passed. In the light of the history of the litigation and the efforts to settle and build a city upon the Hot Springs Reservation, as recited in the opinion, no other conclusion could have been reached. He claimed the right to purchase the lot under a New Madrid Certificate more than fifty years old. For nearly that length of time he and others similarly situated had asserted title to the lot.

The "prior holding of the lot" was validated and the manner of that holding was made the basis for the acquisition of title, but in the case at bar the "prior holding of the lot" was not validated, the right to purchase being given only to the person owning improvements on the lot.

Both parties have proceeded from the beginning of this litigation on the theory that the ownership of improvements carried with it the exclusive right to purchase the lot upon which the improvements are situated, and this is the theory adopted by the Land Department as well as the trial court and Supreme Court of the state. The purpose of the whole litigation has been to determine the ownership of the improvements, realizing that when that question is finally determined

there can be no further question as to the person to whom Congress granted the right to purchase the lot.

The question of the ownership of the improvements involved merely a question of fact which, when determined by the land department, is conclusive both on the State and Federal Courts.

The final decision of the land department on a question of fact between contestants over public lands, and the deduction drawn by said officers and the final conclusion reached upon the evidence are conclusive and binding upon the court.

Greenameyer v. *Coate*, 212 U. S. 434.

Potter v. *Hall*, 189 U. S., 48 L. Ed. 817.

Marquis v. *Frisbie*, 101 U. S. 473, 25 L. Ed. 802.

Lee v. *Johnson*, 116 U. S. 48, 30 L. Ed. 570.

Johnson v. *Townsley*, 13 Wall. 72, 20 L. Ed. 485.

Warren v. *Van Brundt*, 19 U. S. 646, 22 L. Ed. 217.

United States v. *Minor*, 114 U. S. 233, 29 L. Ed. 110.

Baldwin v. *Starks*, 107 U. S., 27 L. Ed. 526.

Gardner v. *Bonstell*, 180 U. S., 45 L. Ed. 575.

Johnson v. *Drew*, 171 U. S., 43 L. Ed. 91.

FINDING OF FACTS.

The land department made the following findings of facts which were substantially the findings of the trial court, concurred in by the State Supreme Court:

"First: I find that the lot involved in this controversy is the same lot described in the pleadings and judgment in a certain unlawful detainer suit wherein Theodore Fitzpatrick was plaintiff and J. P. Ellis defendant, No...., and it appears from the description of said lot in said pleadings and judgment that neither the number, size or survey of same were changed by the Townsite Commission for the Chickasaw Nation.

"Second: I find from the evidence that said Theodore Barnhart for a valuable consideration, sold and transferred all of said improvements and the occupancy of said lot to one J. P. Ellis sometime in the latter part of the year 1897, and that the said Ellis thereafter erected other and additional improvements upon said lot to the value of about $75.00.

"Third: I find that on the 28th day of June, 1898, the date of the final ratification of the Atoka Agreement, the said J. P. Ellis was the exclusive owner of said improvements aforesaid, and all the improvements upon said lot.

"FOURTH: I find that on or about the 7th day of July, 1898, the said Theodore Fitzpatrick filed his suit in unlawful detainer in the United States Court at Chickasha, against the said J. P. Ellis, for the possession of said lot, and that thereafter he filed his amended complaint in said cause, upon which said cause was tried, and in said complaint disclaimed to be the owner of any improvements upon said lot and prayed for an injunction, enjoining defendants from preventing him from entering on a portion of said lot for the purpose of erecting improvements thereon, in order that he might be able to comply with the law to purchase said lot; that said injunction was by the court refused; that said Ellis filed his answer in said cause, denying the allegations of said complaint and as a further defense set up the fact that he was the exclusive owner of permanent substantial and lasting improvements other than temporary house, tillage and fencing, upon said lot.

"FIFTH: I find that in October, 1900, said cause came on for trial before the court and jury and that the issues were found in favor of plaintiff for the possession of said lot. That thereafter the defendant Ellis prosecuted an appeal to the Indian Territory Court of Appeals, which was by the court on the ..... day of ..... 1902, affirmed, and he further prosecuted a writ of error from the decision of that court to the Circuit Court of Appeals for the Eighth Circuit at St. Louis, and that in November, 1902, said decision of the Indian Territory Court of Appeals

and likewise the decision of the United States Court at Chickasha was affirmed.

"SIXTH: I find that none of the improvements upon said lot were in any way in issue in said unlawful detainer suit, and that said J. P. Ellis' ownership of same was not denied or disputed either by the plaintiff or by the pleadings, but in the pleadings and the evidence the said Fitzpatrick admitted the ownership of said improvements to be in the said Ellis, and they were in no way adjudicated upon in said cause.

"SEVENTH: I find that on the 8th day of April, 1899, and while said unlawful detainer suit was pending, the said Theodore Fitzpatrick by his quit-claim deed transferred and quit claimed to one Ella Cross what interest he had or claimed within and to said lot; and I find that said Fitzpatrick did not claim to own any improvements upon said lot and did not intend or attempt to tranfer the same to the said Ella Cross and it is not contended that the said Ella Cross by said quit-claim deed purchased any interest in said improvements; and I further find that the said Ella Cross and J. E. Cross by their certain quit-claim deed, on the 18th day of September, 1900, quit claimed their one-half interest within and to said lot to the said R. M. Bourland.

"EIGHTH: I find that on the date said townsite of Chickasha was laid out by the Townsite Commission for the Chickasaw Nation and on the date the plats thereof prepared by said Commission were finally approved by the Secretary of

the Interior, the said J. P. Ellis was the owner of permanent, substantial and lasting improvements other than fences, tillage and temporary houses on said lot.

"NINTH: I find that contestant's grantors, Bourland and Cross, caused their attorney to appear before Roy G. Bradford, one of the clerks of said Townsite Commission, and represented to the said Bradford that said lot was in litigation and the said Bradford was led to believe that the improvements upon said lot were likewise in controversy or in litigation, and that under said impression the said Bradford made a temporary notation opposite the schedule of said lot upon the record, the words 'in litigation,' but that said notation was only intended to be temporary and for further investigation.

"TENTH: I find that afterwards contestees herein purchased the improvements upon said lot from the said J. P. Ellis and secured a bill of sale or tranfer thereof and went before said Commission and presented said bill of sale and certified that they were the sole and exclusive owners of all improvements situated upon said lot and that the same was not claimed by any one else, and one J. B. Kelsey, a duly authorized clerk of said Commission, ascertaining that said lot had been erroneously marked in litigation, erased the same and duly scheduled the same to said contestees herein.

"ELEVENTH: I further find that as a matter of fact said improvements at the time the same

were scheduled to contestees were not in any way in litigation, and that said contestants nor neither their grantors made any claim before said Commission that said improvements were in litigation or that they owned any interest in said improvements and made no request or demand that said lot be scheduled to them by virtue of being the owners of any improvements upon the same.

"TWELFTH: I find from the evidence that about the first of June, 1902, said Commission proceeded to Chickasha to serve notice upon all persons to whom lots had been scheduled and appraised of their right to purchase said lots under the provisions of the Atoka Agreement, and that notice was duly served upon contestees herein, on or about the 12th day of June, 1902, of their right to purchase said lot under the provisions of the Atoka Agreement, and that they duly acknowledged receipt of said notice and about the 19th day of said month they, according to the rules and regulations of the department, forwarded to the Honorable J. Blair Shoenfelt, United States Indian Agent, at Muskogee, Saint Louis Exchange for the sum of $375.00, the same being 62½ per cent of the appraisement and the full purchase price of said lot, and that said agent, on or about the 29th day of said month, duly acknowledged receipt of said money as the full purchase price of said lot.

"THIRTEENTH: I further find that one of the contestants, H. B. Johnson, at all times prior

to and until after the schedule of said lot to the contestees herein, recognized and acknowledged the said J. P. Ellis and his grantees, contestees, to be the owners of said lot, and that recognizing said ownership on the 1st day of January, 1902, he rented a portion of said lot from the said J. P. Ellis and expressly in said lease acknowledged the said Ellis to be the owner of said lot.

The Supreme Court in the review of cases from the state courts will follow the findings of facts of those courts.

Gardner v. *Bobesteel*, 180 U. S. 362, 45 L. Ed. 574.

Christman v. *Miller*, 197 U. S. 313, 49 L. Ed. 770.

Chatman & D. Land Co. v. *Bigelow*, 206 U. S. 41, 51 L. Ed. 953.

Clipper Mining Co. v. *Eli Mining & Land Co.*, 194 U. S. 220.

The Land Department agreed with the contention of counsel for plaintiff in error as to the effect of the tenant disputing his landlord's title. The land department stated:

"The tenancy having been terminated in April, 1898, what was the effect of the ownership of the improvements? Ordinarily where there is an express provision for the removal of improvements, a reasonable time after the expiration of the term is allowed for that purpose. Failure in this particular will, in

> the absence of some circumstance to change the rule, cause the improvements to inure to the landlord."

Then the Commissioner proceeds, and holds that Fitzpatrick by positive and affimative acts waived his right to take advantage of the forfeiture.

This finding of the Commissioner involved an intent on the part of Fitzpatrick, and a question of intent necessarily involves a question of fact.

In effect the same finding was made by the Special Master and affirmed by the court as follows:

> "I have carefully examined the record before the Department and while I do not believe the conclusion finally arrived at by the Department with respect to the *waiver* and *forfeiture* is sustained by the evidence, I find under the authorities that the question of waiver is a mixed question of law and fact. It particularly involves an intent and as a question of intent is to be determined from the party's actions, surrounding circumstances, as well as the evidence. * * * I do not believe that the court has authority to review the Department's action on this question."

In support of the proposition that a mixed question of law and fact is conclusive upon the court see *Potter* v. *Hall*, 189 U. S. 292, a case ap-

pealed from the Oklahoma Supreme Court, wherein this proposition was sustained; also the case of *Lee* v. *Johnson,* 116 U. S. 48, where this language is used:

> "The court does not interfere with the title of a patentee when the alleged reason relates to a matter of fact concerning which those officers may have drawn wrong conclusions from the testimony."

The contention of opposing counsel with respect to the forfeiture is illogical. The plaintiffs in error claimed neither the improvements, except by forfeiture, nor the title to the lot, nor did they even assert the right to purchase under the treaty. Forfeiture never inures to the benefit of strangers to the title. If a forfeiture of the improvements occurred in this case, they became a part of the realty and inured to the benefit of the tribe.

Every lawyer who practiced in the Five Tribes knows that the provision of the Act of 1898, with reference to the sale of town property, was to enable the pioneers, who, by reason of their labor and enterprise, had builded towns and cities, to break away from the feudalism of Indian landlords and procure title to their lots, whose value had been so much enhanced by their labor.

By way of illustration, we may cite an instance of a single town, whose situation was similar to that of hundreds of other towns in Indian Territory. The several thousand inhabitants of the Town of Ardmore, at the time of the passage of the Curtis Act, were paying rents to an Indian landlord, one Richard McLish. If counsel's contention is correct, it was McLish and not the thousands of owners of improvements who occupied the various lots in Ardmore, who had the right to purchase these lots; and the Townsite Commission assisted these people in perpetrating a grievous fraud upon McLish. It should be stated, however, in justice to Mr. McLish, that he never claimed such a construction of the law, and so far as our experience personally goes, there was but one Indian landlord in the entire Five Tribes that did claim such a construction.

If the Department rightfully decided the question under the statute, then it cannot be said that it committed an error which a court of equity may correct.

In other words, to apply the rule contended for would be to hold that although the Department decided correctly under the law yet this court will hold that it decided erroneously in order to decree

that the plaintiffs hold the property in trust for the defendants, because a court of equity does not disregard the statute for the purpose of determining the equities of the parties, but determines their equities based upon and created by the statute. In other words, if the Department has correctly decided the question under the statute, then it committed no error for this court to correct.

This we think is the universal holding of the courts, especially the Supreme Court of the United States and the Supreme Court of Oklahoma, and the court will not be authorized to read into the statute exceptions not warranted. On this point we desire to quote from the case of *United States* v. *Goldberger*, 168 U. S. 102. Mr. Justice Brewer delivering the opinion of the court uses this language:

> "The primary and general rule of statutory construction is that the intent of the law maker is to be found in the language he has used. He is presumed to know the meaning of words and the rules of grammer. The courts have no function of legislation and simply seek to ascertain the will of the legislature. It is true there are cases in which the letter of the statute is not deemed controlling but the cases are few and exceptional and only arise when there are cogent reasons for believing that the letter does not fully and

accurately disclose the intent. *No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition* to the language of the statute."

Applying this doctrine to the case at bar, did the Department come to an erroneous decision upon undisputed questions of fact? Did it give to one man under the law property legally belonging to another? Was it justified in reading into the statute that in cases where the tenant was the absolute and unquestioned owner of the improvements the statute meant that the landlord should have the preference right? Did the Department have and has the court the right to resolve itself into a legislative body and conclude that the omission of the law makers to make exceptions in favor of landlords justifies the court in making that addition for the reason it appears that the legislature omitted that important exception? Did the Department have the right and has the court a right to say that it appears that the legislature failed to provide for such contingencies which it appears should have been done and that the court will make such an exception and provision? To carry out counsel's conclusion although the Department committed no error, but decided the

question right and proper under the statute, yet the court should, notwithstanding that fact, create and enforce an equity. Would it not be in direct conflict with the rule laid down by Justice Brewer in the opinion above referred to?

In reviewing the decision of the state court, adverse to a title which depends on the construction of an act of Congress, The Supreme Court of the United States cannot take into consideration any distinct equity arising out of the contracts or transactions of the parties, and creating a new and independent title, but is confined to an examination of the validity of the title under that statute.

> *Maithews* v. *Zane*, 7 Wheat. 164, 5 L. Ed. 425.
> *Lewis* v. *Lewis*, 9 Mo. 190.
> *Magwire* v. *Tyler*, 47 Mo. 126.

The case of *Magniac et al* v. *Thompson*, reported in 15 Howard U. S., Book 14, L. C. P. 696. Quoting from the bottom of page 703:

> "Wherever the rights or the situation of parties are clearly defined and established by law equity has no power to change those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable."

Again, quoting from page 705:

> "Such being our conclusions upon this

branch of the case the same conclusions being implied in the application of the appellants for equitable interposition, the inquiry here presents itself whether a court of equity can be called upon to abrogate or impair or in any manner or degree interfere with clear, ascertained and perfect legal rights. The simple statement of such an inquiry suggests one correct reply. Equity may be invoked to aid in completion of a just but imperfect legal title or to prevent the successful assertion of an unconscientious and incomplete legal advantage, but to abrogate and assail a perfect and independent legal right it can have no pretensions. In all such instances equity must follow, or in other words, be subordinate to the law."

Other reasons why the defendants' contention in this case is not sound and why the judgment of the trial court should be affirmed:

First: Neither defendants nor their predecessors in interest had any legal or equitable right as against the Chickasaw and Choctaw Nations and the Government, or any claim preventing the Government from disposing of the property in any way it might see proper, since they did not own the improvements. Quoting from the case of *Gonzales* v. *French*, 164 U. S., Book 41, p. 461, the Supreme Court stated:

"Whatever may have been the possessory rights of the plaintiff in error as against other

claimants under the ordinary land laws such rights could not avail against the right of Congress to confer said lands upon other parties."

Frisbie v. *Whitten*, 76 U. S., 9 Wall. 187, Book 19, p. 668.

Hutchins v. *Law*, 82 U. S., 15 Wall. 77, Book 21, p. 82.

Shepley v. *Cowan*, 91 U. S., Book 23, p. 424.

"The settlement even when accompanied with the improvements of the parties, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper. The power of disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by law for the acquisition of a title, including the payment of the price of the land, have been performed by the settler. When these prerequisites were complied with the settler *for the first time* acquired a vested interest in the premises of which he could not be subsequently deprived."

Gonzalas v *French*, *supra*.

In connection with the above authorities we cite and quote from two decisions of the Circuit Court of Appeals, which lay down the same rule:

"Where a party has not placed himself in a position to create a right in himself as against the Government in regard to public or *quasi*-public lands of the United States, then he is in

no position to warrant a court of equity in giving him relief against the successful purchaser of such land."

This doctrine is laid down and well illustrated in the late case of *Campbell* v. *Weyerhaeuser et al.*, reported in 88 C. C. A., 412, opinion by the Circuit Court of Appeals for the Eighth Circuit, April 17, 1908, by Presiding Justice Sanborn. From the syllabus it is stated:

> "One who has never by acceptance of a grant or by settlement and improvements or by entry or by payment placed himself in privity with the United States title before a patent issues to enter may not maintain a bill in equity to charge the title under it with a trust in his favor. One whose application to purchase is rejected when presented may not maintain such a suit."

Also to same effect see *Norton* v. *Evans et al.*, 27 C. C. A. 168, opinion rendered from the same circuit by Justice Brewer. In concluding the opinion Justice Brewer states as follows:

> "He is in no better position than if he had been allowed by the local land office to make the entry. Such an entry creates no vested rights as against the United States and does not interfere with the power of Congress by subsequent legislation to dispose of the land." Citing several authorities.

Apply the above doctrine to the case at bar. As shown by the decision of the land department

the defendants have never in any way placed themselves in a situation or connected themselves with the title to the lot in question so as to have any rights against the United States, so as to bring themselves in any sense under the provision of the Act of Congress to entitle them to purchase. The only wrong they charge against the plaintiff is that by reason of the law giving J. P. Ellis, plaintiff's predecessor in interest, the right to execute a supersedeas bond, and by reason of the fact that Ellis exercised his right under that law, then that he thereby committed a great wrong upon the defendants and prevented them from doing that which they say they intended to do. The Interior Department, however, as well as the trial court, upon questions of fact, found that the defendant's predecessors sought an injunction from the court of equity to enjoin the plaintiff's predecessor from preventing them taking possession of and improving the said lot, but that said injunction was denied. The finding of the trial court is in this language:

> "And that thereafter he (Fitzpatrick) filed his amended complaint in said cause, upon which said cause was tried, and in said complaint disclaimed to be the owner of any improvements upon said lot and prayed for an injunction, enjoining defendants from prevent-

> ing him from entering on a portion of said lot for the purpose of erecting improvements thereon, in order that he might be able to comply with the terms of the Curtis Act to purchase said lot. That said injunction was by the court refused."

On this point we respectfully call the court's attention to the language used by the opinion of the Secretary of the Interior upon the petition for re-hearing, prepared by the Attorney General for that department, as follows:

> "It is quite manifest that the contestants who claim to be alleged purchasers from said Bourland and Cross long after said lot was scheduled to the contestees, have no right to demand that the schedule be changed and patent issue to them. They do not claim to have been owners of the lot when it was appraised by the Townsite Commission, and the law requires that the lot shall be scheduled to the owners of improvements at the time the schedule and appraisement are made."

In *Burke* v. *Southern P. R. Co.*, 234 U. S. 669, 58 L. Ed. 1527, it was said by this court:

> "Persons not in privity with the government in any respect when a patent was issued under the railway land grant act of July 27, 1866, 14 Stat. at L. 292 (Chap. 278), cannot attack such patent on the ground of fraud, error, or irregularity in the issuance of the patent."

Applying this doctrine in connection with the

doctrine laid down by Justice Brewer in the case of *United States* v. *Goldenberger, supra,* it is clear that Congress had the authority as well as the right to confer the right to purchase lots in the Chickasaw and Choctaw Nations upon the owners of improvements solely, and prescribe the manner of such purchase, and that too without regard to the contractual relations, if any, theretofore existing between other parties; if it is plain that Congress has sought to do so, then it is the duty of the courts to carry out the intent of the law-makers. What right did the defendants in this case have in the property in question that Congress was compelled to recognize?

Suppose the tenant was in possession of the lot with only a fence and temporary improvements, which were not sufficient under the terms of the statute to entitle him to purchase, and he refused to improve, to comply with the law and by force prevented the landlord from improving, and wrongfully kept the landlord out of possession, and when the time arrived for the Townsite Commission to schedule and sell the lot neither the landlord nor the tenant had complied with the treaty, although they might hold that the landlord had been wronged by

the tenant, yet would there be any alternative except to sell the lot at public sale? Suppose, on the other hand the claimant of the lot should make a lease contract and lease it to a party, with the privilege of improving, but the tenant was unable to improve and secured the assistance of a third party under an agreement that he would put substantial and lasting improvements on the lot, that the title to the improvements should remain in the third party, and it being conceded that title to the lot was in the Chickasaw and Choctaw Nations, and the Townsite Board should arrive to execute the law in question and found the lot in this condition, would it not be their plain duty to ignore the claims of either the landlord or the tenant and schedule the lot to the conceded owner of the improvements, although the landlord might have a suit pending against the tenant for possession of the lot and although the tenant might be contesting his right to possession and remain in possession of the lot by virtue of a supersedeas bond while the case was on appeal?

> "A court of chancery does not make titles where there are none, but only will compel persons who obtained the legal title unjustly

and by fraud to restore it to those who under the law are entitled thereto."

Willet v. *Overton*, 2 Root 338.

"In equity as well as in law the plaintiff must recover on the strength of his own title and not on the weakness of his adversary, and a complete equitable title must be shown to entitle the plaintiff to recover, as in law a complete legal title must be shown."

Grand Gulf R. R. Co. v. *Bryan*, 16 Miss. 8 Smeds. & M. 234.

Bock v. *Perkins*, 139 U. S., Book 35, p. 314.

The general rule that the tenant is estopped from questioning and disputing his landlord's title has exceptions which are as well founded as the rule itself.

To support the above proposition we cite the following authorities:

Welker v. *McComb*, 30 S. W. 822.
McKie v. *Anderson*, 14 S. W. 576.

The rule may be waived:

Wood v. *Chambers*, 3 Rich. Law 150.
Camp v. *Camp*, 5 Conn., 13 A. D. 60.

Party may show a superior title before surrender.

Dodge v. *Phelan*, 21 S. W. 309.
Wild's Lessees v. *Serpell*, 10 Grant. 405.

Tenant may also show his landlord's title has expired.

Rider v. *Mansell*, 66 Mo. 167.
Bigler v. *Furman*, 58 Barb. 545.
McGuffy v. *Carter*, 4 N. W. 211.
Jackson v. *Rayland*, 22 A. D. 557.
Rhyne v. *Guevera*, 67 Miss. 139.
Devacht v. *Newman*, 3 Ohio (3 Hain.) 57.
Harvey v. *Harvey*, 2 S. E. 3.

The rule that the tenant cannot deny his landlord's title is limited to suits for possession only and does not apply to an action of trespass to try title and for partition, in which the title itself is put in issue.

McKie v. *Anderson* (Tex.), 14 S. W. 576.
Bartley v. *McKinney*, 28 Grant 750.

The rule that the tenant cannot show that his lessor never had title is for the benefit of the *lessor* and may be waived by him.

Wood v. *Chambers*, 3 Rich. Law 150.
Wilson v. *Cleveland*, 30 Cal. 192.
Tewkbury v. *Magraff*, 33 Cal. 237.
Camp v. *Camp*, 5 Conn. 291, 13 A. D. 60.

An estoppel, created by a lease, operates to give full effect to the contract, but beyond that

terminates with the estate demised and the tenant may then set up a pre-existing title in himself even against the lessor.

Page v. *Kinsman*, 43 N. H. 328.

After surrendering the lease the lessee may without surrendering possession assert claim to a superior title.

Dodge v. *Phelan*, 21 S. W. 309.

A tenant who surrenders possession at the end of his term, or from whom possession is recovered is not concluded by the former existence of such tenancy or by his former lease from contesting the title of his former landlord.

Wild's Lessees v. *Serpell*, 10 Grant. 405.

The rule that a tenant cannot dispute the title of his landlord applies only to the title the landlord had at the inception of the lease.

Towne v. *Butterfield*, 93 Mass. 100.
Wolf v. *Johnson*, 30 Miss. 513.
McAusland v. *Pundt*, 1 Nebr. 211, 93 A. S. 358.

The general rule that a tenant will not be permitted to question his landlord's title so long as he holds the possession originally derived from him does not forbid the tenant from showing that

the landlord's title has expired or been extinguished since the tenancy commenced.

Martin's Heirs v. *Reynolds*, 39 Ky. (9 Dana), 328.

Farris v. *Houston*, 74 Ala. 162.

Robertson v. *Biddell*, 32 Fla. 304, 13 South 358.

Winn v. *Strickland*, 34 Fla. 610, 15 South 606.

Tilghman v. *Little*, 13 Ill. (3 Peck.), 293.

St. John v. *Quitzow*, 72 Ills. 334.

Kinney v. *Laman*, 8 Blackf. 350.

Casey v. *Gregory*, 52 Ky. (13 B. Mon.), 505, 56 A. D. 581.

Giles v. *Ebsworth*, 10 Md. 333.

Wolf v. *Johnson*, 30 Miss. 513.

Robinson v. *Troup Min. Co.*, 55 Mo. App. 662.

Russel v. *Allard*, 18 N. H. 222.

Howell v. *Ashmore*, 28 N. J. Law (2 Zab.), 261.

Horner v. *Leeds*, 25 N. J. Law (1 Dutch), 106.

Lawrence v. *Miller*, 3 N. Y. Sup. Ct. (1 Sandf.), 516.

Hilton v. *Bender*, 4 Thomp. & Co.,270

Devacht's Lessee v. *Newsam*, 3 Ohio (3 Ham.), 57.

Franklin v. *Hurlbut*, 1 White & W. Civ. Cas. Ct. App. 816.

Was the plaintiff or was his predecessor in interest ever at any time the tenant of the present

defendants, or did the relation of landlord and tenant ever exist between said parties? Our contention is that this question must be answered in the negative.

At an early date the common law doctrine in reference to an estoppel on the part of the tenant from disputing his landlord's title ceased at the expiration of the tenancy or lease contract under which the tenant entered. However, this doctrine has been since modified to the extent that it continues until possession of the premises is surrendered, except in those cases coming within the exception to the general rule, that is, that the landlord's title has expired by operation of law or otherwise; but, we contend that the authorities hold that in no case does the relation continue after the surrender of possession and expiration of the term.

The record in the case before the court shows that if the relation of landlord and tenant ever existed between Ellis and Fitzpatrick it was from month to month. Then according to the contention of the defendants that Ellis, the tenant, repudiated Fitzpatrick's title and set up title in himself, might he terminate the relation? Upon that theory a suit of unlawful detainer was filed on the 7th of July, 1898. In January, 1903, the plaintiffs hav-

ing succeeded in that case, *Ellis was dispossessed and possession given to Fitzpatrick or Bourland and Cross.* At no time prior thereto did the present defendants claim or in any way assert any interest in the premises. In May, 1903, for the first time, the present defendants claim to have succeeded to whatever interest Bourland and Cross claimed.

Now, the question arises, if the relation of landlord and tenant did not cease between Ellis and Fitzpatrick, when would it ever cease? Conceding that the relation did exist between Fitzpatrick and Ellis prior to the bringing of the unlawful detainer suit, after that suit for possession had been concluded, possession surrendered thereunder and the plaintiff and his successors placed in possession, is it possible for the present defendants who afterwards claim to have purchased what interest Bourland and Cross claimed, to successfully plead an estoppel upon the plaintiff in this suit, brought not for the possession alone but for the purpose of trying title? We respectfully submit that under the authorities the relation of landlord and tenant and the doctrine of estoppel does not extend that far, and in support of this we desire to cite Enc. of Law, under

head of Landlord and Tenant, pp. 421-422: *Peyton* v. *Stitch*, 5 Peter (U. S.) 485. Also:

Smith v. *Mundy*, 18 Ala. 182.
Bishop v. *Blair*, 36 Ala. 80.
Hughes v. *Watts*, 28 Ark. 153.
Wilson v. *Cleveland*, 30 Cal. 192.
Arnold v. *Woodward*, 14 Colo. 164.
Welborne v. *Hood*, 68 Ga. 825.
Wycoff v. *Miller*, 48 La. 475.
Heath v. *Williams*, 25 Me. 209.
McCrary v. *McCrary*, 90 Mich. 478.
Crockett v. *Althouse*, 35 Mo. App. 404.
Mattis v. *Robertson*, 1 Nebr. 3.
Utica Bank v. *Mersereau*, 3 Barb. 528.
Benton v. *Benton*, 95 N. C. 559.
Hemming v. *Warner*, 101 N. C. 406.
Smart v. *Smith*, 2 Dev., 13 N. C. 258.
Boyers v. *Smith*, 3 Watts. (Pa.) 449.
Juneman v. *Franklin*, 67 Tex. 411.
Hillock v. *Sutton*, 2 Ont. 548.

The doctrine as laid down in the case of *Peyton* v. *Stitch*, 5 Peter, *supra*, was where the tenant while in possession purchased the interest and obtained a deed from a party claiming to be a prior settler by pre-emption of the public land, and the landlord obtained a judgment in ejectment against him for possession, and he filed a bill in equity undertaking to restrain the execution of this judgment. His bill was dismissed on the ground that while in possession he could not set up that

equitable title, but was estopped by reason of the relation of landlord and tenant, but states the doctrine to be that this estoppel only existed until he had surrendered possession.

The case of *Arnold* v. *Woodward*, 14 Colo., was a suit similar to the case now before the court. The tenant while a tenant obtained from the United States a patent to certain land. A suit for possession was brought against him and he undertook to set up the title by the patent in defense (reported in 4 Colo. 247). The doctrine contended for above was laid down in both the 4 Colo., and also in the 14 Colo., *supra*. In the second Colorado case above referred to they also recognize the exception to the general rule of estoppel on the part of the tenant, that he may while in possession as tenant, prior to surrendering possession, show that the landlord's title has been voluntarily conveyed or has ceased to exist by operation of law; but it is not necessary for the plaintiff in the present suit to invoke that doctrine as possession had been surrendered and he is now contesting a third party who was never his landlord or the landlord of his predecessor, but was a tenant of his (plaintiff's) predecessor.

The tenant is likewise permitted to show that the title of the landlord since he entered in possession has terminated or expired by operation of law.

This is an exception to the general rule and is as well established as the rule itself.

The doctrine is upheld in England and the following cases in the American courts have also established this exception to the rule:

Clerk v. *Clark*, 51 Ala. 498.
Farris v. *Houston*, 74 Ala. 162.
Otis v. *McMillan*, 70 Ala. 46.
Caldwell v. *Smith*, 77 Ala. 157.
Randolph v. *Carlton*, 8 Ala. 606.
Pope v. *Harkins*, 16 Ala. 321.
McDevitt v. *Sullivan*, 8 Cal. 592.
Tewksbury v. *Magraff*, 33 Cal. 237.
Wheelock v. *Warschauer*, 21 Cal. 309.
Rodgers v. *Palmer*, 33 Conn. 156.
Camp v. *Camp*, 5 Conn. 291.
Robertson v. *Biddell*, 32 Fla. 304.
Winn v. *Strickland*, 34 Fla. 610.
St. John v. *Quitzow*, 72 Ill. 334.
Wells v. *Mason*, 5 Ill. 84.
Tilghman v. *Little*, 13 Ill. 239.
Kinney v. *Doe*, 6 Blackf. (Ind.) 350.
Stout v. *Merrill*, 35 Iowa 47.
Swan v. *Wilson*, 1 A. K. Marsh (Ky.) 99.

Gregory v. *Crab*, 2 B. Mon. 234.
Logan v. *Steele*, 7 T. B. Mon. (Ky.) 104.
Casey v. *Gregory*, 13 B. Mon. (Ky.) 508.
Elms v. *Randall*, 2 Dana (Ky.) 100.
Rydert v. *Mansell*, 66 Me. 167.
Presstman v. *Stilljacks*, 52 Md. 647.
Giles v. *Ebsworth*, 10 Md. 333.
Lamson v. *Clarkson*, 113 Mass. 348.
Emmes v. *Feeley*, 132 Mass 346.
Hilbourn v. *Fodd*, 99 Mass. 11.
Indian Land & T. Co. v. *Clement*, 109 Pac. 1089.
Dale v. *Parker* (Mo.), 128 S. W. 510.
Grundin v. *Carter*, 99 Mass. 15.
Niles v. *Ransford*, 1 Mich. 338, 51 A. D. 95.
Rhyne v. *Guevara*, 67 Miss. 139.
Jones v. *Madison County*, 72 Miss. 777.
Wolf v. *Johnson*, 30 Miss. 513.
Barclay v. *Picket*, 38 Mo. 143.
Stagg v. *Eureka Tanning Co.*, 56 Mo. 317.
Robinson v. *Troup Min. Co.*, 55 Mo. App. 662.
Meier v. *Theiman*, 15 Mo. App. 307.
McAusland v. *Pandt*, 1 Neb. 211, 93 A. D. 348.
Russell v. *Allard*, 18 N. H. 222.
Dew v. *Ashmore*, 22 N. J. L. 261.
Hornett v. *Leeds*, 25 N. J. L. 106.
Jackson v. *Rowland*, 6 Wend. 666 (N. Y.), 22 A. D. 557.
Hoag v. *Hoag*, 35 N. Y. 469.

Ryers v. *Farwell*, 9 Barb. (N. Y.) 615.
Lawrence v. *Miller*, 1 Sandt. 516.
Lane v. *Young*, 66 Hun. (N. Y.), 563.
Van Etten v. *Van Etten*, 69 Hun. 499.
Lodge v. *Martin*, 31 N. Y. App. 13.
Boyd v. *Sametz* (N. Y.), 17 Misc. 728.
Lancashire v. *Mason*, 75 N. Car. 455.
Deracht v. *Newsam*, 3 Ohio 67.
West Shore Mills Co. v. *Edwards*, 24 Oregon 475.
Newell v. *Gibbs*, I. W. & S. (Pa.), 496.
Sparks v. *Walton*, 4 Phila. 72.
Hill v. *Miller*, 5 S. & R. (Pa.) 355.
Smith v. *Crosland*, 106 Pa. St. 413.
Bowser v. *Bowser*, 8 Hump. (Tenn.) 23.
Orleans County Grammer School v. *Parker*, 25 Vt. 696.
Pierce v. *Brown*, 24 Vt. 165.

The doctrine laid down in the above decisions is in the nature of a confession and avoidance. It does not permit the tenant to deny the landlord's title, but in effect affirms the title under which he entered, but says notwithstanding that title and notwithstanding it was valid at the time he entered, yet it has since expired by operation of law and the tenant has become the owner thereof.

"No rule of law or public policy prevents a tenant from purchasing during the term for his own benefit a title adverse to that of his landlord and after surrendering possession may set up in any character of action his title

and contest the right of his former landlord."

This proposition is sustained by the following decisions:

Bright v. *Boyd*, 1 Story (U. S.) 478.
Hodgen v. *Guttery*, 58 Ills. 431.
Green v. *Detrick*, 114 Ills. 636.
Carson v. *Crigler*, 9 Ills. App. 83.
Hodgen v. *Shields*, 18 B. Mon. 831.
Kelley v. *Kelley*, 23 Me. 193.
Pressman v. *Stilljacks*, 52 Md. 647.
Walker v. *Harrison*, 75 Miss. 665.
Pickett v. *Ferguson*, 16 Tenn. 342.
Lang v. *Carruthers*, 21 Tex. Civ. App. 118.

There is nothing in the case at bar in conflict with the above authorities. The tenant did not acquire his title in any sense by virtue of possession; in fact the possession had no bearing upon the acquisition of the title.

In support of the [illegible] proposition of law set out in the first part of this brief, we respectfully cite the following authorities:

The case of *Bassett* v. *Mitchell*, reported in 3 Okla. 177, the syllabus is as follows:

"Where a settler upon a lot, claiming under the Act of Congress of May 14, 1890, fails to assert any right to the lot before the Board of Townsite Trustees, and such failure was

wholly by his own laches, he becomes thereby estopped from obtaining relief in a court of equity."

Roberts v. *Hughes*, 25 A. Rep. 270.
Marshall v. *Means*, 56 A. D. 444.
Ross v. *Singleton*, 12 A. D. 86.
Ross v. *Stewart*, 106 Pac. 870, 22 Okla.

In support of the above authority we quote again from the case of *Magniac* v. *Thompson*, L. C. P. (U. S.), Book 14, at bottom of page 705:

"With regard to the question raised by the demurrer as to the obligation of the appellants to pursue their remedy at law under the allegations in the bill that such legal remedy had been reserved to them by the terms of the agreement, there can be no doubt that this remedy remains unimpaired, that the appellants cannot arbitrarily abandon it and seek the interposition of equity in a matter purely legal."

Without again quoting from the testimony and finding of facts in the record, it will be remembered that the defendants' predecessors in interest under oath admitted that they made no claim to have said lot in question scheduled and awarded to them by the Townsite Commission. The Land Department found as a matter of fact that said defendant made no such claim and failed to request the Townsite Commission to schedule and award said

lot to them, and the trial court has found as a matter of fact to the same effect.

Applying the authority to that state of facts, can the defendants now in a court of equity be heard to complain of not securing their asserted rights under the law before the proper authorities authorized to hear and determine their claim?

In the case of *Ross* v. *Stewart*, from the Supreme Court of Oklahoma, 227 U. S. 532, 57 L. Ed. 627, the second paragraph of the syllabus reads:

> "Relief will not be given in the courts from the decision of a townsite commission for a town in the Cherokee Naton in a contest arising on conflicting application to purchase, or from the resulting patent, unless it clearly appears that the commissioners committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they themselves were chargeable with fraudulent practices, and that as a result the patent was issued to the wrong party."

The opinion of the Supreme Court of Oklahoma was affirmed.

This is the general rule, and that it is a sound proposition cannot be controverted, and it does not conflict with the recent decision of this Court in the case of *Garrett et al.* v. *Wakefield et al.*, but

~~It is in harmony with the doctrine laid down in that case.~~

The fact that the present defendants, as well as their predecessors in interest, delayed from June or July, 1902, until January, 1906 a period of almost four years, before taking any action, might reasonably be held to be an acquiescence on the part of plaintiffs in error in the action of the Townsite Commission, and especially so when we recall such conduct and action in connection with their own sworn allegation that the temporary notation "in litigation" was perfectly satisfactory to them and that they gave the matter no further attention.

Respectfully submitted,

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